No. 85-2010

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC), LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC) and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC),

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, and UNITED POLITICAL ACTION COMMITTEE OF CHESTER COUNTY, DAVID DANTZLER, JR., JOHN R. HICKS, III, DOCK L. MEEKS, individually and on behalf of others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE WOMEN'S LEGAL DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CONSENT OF PARTIES	2
INTEREST OF AMICI CURIAE	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE UNIONS' DISCRIMINATORY FAILURE TO PROCESS RACIAL GRIEVANCES VIOLATED TITLE VII AND SECTION 1981	5
A. Under Title VII A Union Cannot Treat The Right To Freedom From Discrimination Less Favorably Than Other Rights Secured Under A Collective-Bargaining Agreement	6
B. The Unions' Deliberate Refusal To Process Racial Grievances Violated Section 1981.	10
II. UNION LIABILITY UNDER SECTION 1981 AND TITLE VII FOR REFUSAL TO FIGHT EMPLOYER DISCRIMINATION IS CONSISTENT WITH NATIONAL LABOR RELATIONS POLICIES	11
A. Construing Title VII And Section 1981 To Prohibit A Union From Discrimination In The Processing Of Members' Grievances Is Consistent With The Duty Of Fair Representation	11
B. Requiring A Union To Meet Its Obligations Under Title VII And Section 1981 Imposes No Excessive Burdens Upon Unions	13
III. A UNION MAY NOT COMPROMISE RIGHTS SECURED BY TITLE VII OR SECTION 1981	14
IV. DISCRIMINATION CAN BE EFFECTIVELY ELIMINATED ONLY IF IT IS EXPOSED	17
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	14, 15, 18
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ..	13
Anderson v. City of Bessemer City, 470 U.S. 564 (1985) .	10
Altman v. Stevens Fashion Fabrics, 441 F. Supp. 1318 (N.D. Cal. 1977)	18
Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985)	17
Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984)	8
Burnett v. Grattan, 468 U.S. 42 (1984)	7
Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252 (N.D. Ind. 1977)	8, 9
Diaz v. American Tel. & Tel., 752 F.2d 1356 (9th Cir. 1985)	17
Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975)	13, 15, 16, 17
EEOC v. Local 638 . . . Local 28, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821 (2d Cir. 1976), *aff'd, sub nom. Local 28 of Sheet Metal Workers' Int'l Ass'n*, 106 S. Ct. 3019 (1986)	18
General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982)	10
Goodman v. Lukens Steel Co., 580 F. Supp. 1114 (E.D. Pa. 1984), *aff'd in part, rev'd in part, vacated in part*, 777 F.2d 113 (3d Cir. 1985), *reh'g denied*, 40 Emp. Prac. Dec. (CCH) ¶ 36,153 (3d Cir.) (en banc), *cert. granted*, 107 S. Ct. 568 (1986)	*passim*
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	13
Howard v. International Molders and Allied Workers Union, AFL-CIO-CLC, Local #100, 779 F.2d 1546 (11th Cir.), *cert. denied*, 106 S. Ct. 2902 (1986)	8
Hughes Tool Co., 147 N.L.R.B. 1573 (1964).....	16
International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)	7
Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967)	16

	Page
Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973)	8, 9, 11
McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)	15
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	7
Nix v. Williams, 467 U.S. 431 (1984)	18
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	10
Reeder-Baker v. Lincoln Nat'l Corp., 649 F. Supp. 647 (N.D. Ind. 1986)	18
Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975)	18
Stamford Bd. of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70 (2d Cir. 1982)	17, 18
Steele v. Louisville & N. R.R., 323 U.S. 192 (1944)	12
Stephenson v. Simon, 448 F. Supp. 708 (D.D.C. 1978)	18
Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982)	18
Toney v. Block, 705 F.2d 1364 (D.C. Cir. 1983)	18
Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944)	13
United States v. Ceccolini, 435 U.S. 268 (1978)	18
United States v. N. L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973)	15
Vaca v. Sipes, 386 U.S. 171 (1967)	11, 12, 13, 16
Wallace Corp. v. NLRB, 323 U.S. 248 (1944)	16
STATUTES	
Fed. R. Civ. P. 52(a)	10
Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, (July 2, 1964), *codified as amended at* 42 U.S.C. § 2000e *et. seq.* (1982)	*passim*
Section 703(c), 42 U.S.C. § 2000e-2(c)	*passim*
42 U.S.C § 1981 (1982)	*passim*
MISCELLANEOUS	
110 Cong. Rec. 2732 (1964)	19
Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980)	11, 12

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CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief. Petitioners' letter of consent is being filed herewith. Respondents' letter of consent has been filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in such efforts.

The National Association for the Advancement of Colored People is a New York nonprofit membership corporation. Its principal aims and objectives include promoting equality of rights and eradicating caste or race prejudice among the citizens of the United States and securing for them increased opportunities for employment according to their ability.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution and the laws of the United States.

The Mexican American Legal Defense and Educational Fund is a national civil rights organization established in 1967. Its principal object is to secure through litigation and education, the civil rights of Hispanics living in the United States.

The Women's Legal Defense Fund ("WLDF") is a nonprofit organization founded in 1971 to advance women's rights. It represents women in employment discrimination litigation, operates an employment discrimination counseling program, conducts public education and represents women's interests before the Equal Employment Opportunity Commission and other Federal agencies. A major priority for WLDF is its Employment Rights Project for Women of Color.

Amici have a direct interest in the law governing the construction and application of the civil rights statutes. Amici and those individuals whom amici represent litigate under these statutes regularly and thus have a strong incentive to prevent diminution of the statutes' powers as sources of redress for civil rights violations.

STATEMENT OF THE CASE

Amici Curiae incorporate the Statement of the Case submitted by respondents herein.

SUMMARY OF ARGUMENT

The pervasive flaw in the arguments put forth in the briefs of petitioners and the Solicitor General is that they set out and attempt to resolve issues that are not now before this Court. The narrow question presented here is if a union, when requested by its minority membership to process meritorious racial grievances, refuses to do so solely because those grievances are based upon racial discrimination, does that union violate Sections 703(c)(1) and (3) of Title VII ("Section 703(c)" or "Title VII") and 42 U.S.C. § 1981 ("Section 1981").

Holding a union liable under Title VII and Section 1981 for its deliberate decisions not to attempt to eliminate employer discrimination prohibited by the collective-bargaining agreement is consistent with national labor policy. It grants to a

union's minority membership the added protection of temperance of a policy principled upon majority rule. Even under the National Labor Relations Act, where a union is the certified collective-bargaining agent for its membership, that union has a duty fairly to represent each union member in negotiating a collective-bargaining agreement and in enforcing that agreement equally for all members. The National Labor Relations Board has determined that deliberate failure to process racial grievances is a breach of that duty. At a minimum, practices that violate that duty should be prohibited under Title VII and Section 1981.

Thus, this Court's affirmance of the decision of the Court of Appeals for the Third Circuit would create no significant additional burdens or obligations because most of those suggested herein already exist under the National Labor Relations Act. Moreover, squarely confronting an employer with racial discrimination grievances will persuade the employer to end discriminatory practices and will result in fewer grievances for the union to process overall.

The clear purpose of Title VII and the Civil Rights Act of 1866 (which includes Section 1981), is to eliminate discrimination and the harmful effects of decades of discriminatory practices. Deterrence of discrimination can best be effected if discriminatory conduct is brought out in the open. Grievances that ignore the motivating factor of discrimination in the conduct complained of, while they may serve to repair some of the damage done to a single individual, cure merely the symptom, but not the disease. Charges of discrimination stigmatize the individuals at whom they are aimed, making it more likely that unlawful practices will be terminated. When a union singles out meritorious racial grievances for less favorable treatment than all other meritorious grievances, it not only engages in illegal discrimination itself, but it also causes the perpetuation of illegal discrimination by the employer.

In litigating cases against employers with union contracts, Amici herein have repeatedly encountered the same factual

pattern as the instant case. There is virtually always a collective-bargaining agreement with a nondiscrimination clause, but most of the unions have never processed a single claim under the nondiscrimination provisions, and have engaged in the practice of characterizing discrimination claims as some form of nonracial grievance or otherwise not processing the claims at all. These practices have, in fact, done nothing to eliminate entrenched patterns of discrimination; litigation against the employer was still necessary.

When a union seeks piecemeal relief for individual members by processing "seniority" grievances where possible, in the long run that union wastes, rather than preserves, its valuable resources. As long as a union refuses to bring employer discrimination out into the open, discrimination will continue. Thus, ignoring the underlying problem will result in a treadmill of "seniority" or other such claims. This lawsuit is a perfect example of how fighting the symptom is not enough. Unless the curative measures are aimed at the disease of discrimination, the ultimate goal of Title VII can never be fulfilled. There will always be another "seniority" grievance to process.

ARGUMENT

I. THE UNIONS' DISCRIMINATORY FAILURE TO PROCESS RACIAL GRIEVANCES VIOLATED TITLE VII AND SECTION 1981.

The unions repeatedly argue that they are not vicariously liable for the discriminatory employment practices of Lukens. Petitioners' Brief at 25-26.[1] However, that was not the issue before either the District Court or the Court of Appeals, nor is it the issue now before this Court.

Here the question is whether the discriminatory conduct of the unions, found to be racially motivated, violated the rights of

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[1] Hereinafter "Pet. Br. at". References to the Brief of the United States as Amicus Curiae are "U.S. Br. at".

respondents and created union liability under Section 703(c) of Title VII[2] and Section 1981.[3] Amici submit the answer to that question is yes.

A. Under Title VII A Union Cannot Treat The Right To Freedom From Discrimination Less Favorably Than Other Rights Secured Under A Collective-Bargaining Agreement.

Petitioners make the unsupported statement that the only section of Title VII applicable to the issues herein is Section 703(c)(3), and that the unions cannot be held to have

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[2] Section 703(c) provides:

"§ 2000e-2. Unlawful employment practices

". . .

"(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

42 U.S.C. § 2000e-2 (1982).

[3] Section 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of the laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1981 (1982).

"caused" Lukens' discriminatory practices in violation of that section. Pet. Br. at 25-26. Their argument fails on two counts. First, any time a union takes affirmative steps toward avoiding confrontation with an employer on the issue of racial discrimination, that union contributes to the perpetuation of the employer's discriminatory conduct in violation of Section 703(c)(3). Second, deliberately deciding not to process racial grievances protected by Title VII in favor of the promotion of other rights secured under a collective-bargaining agreement is discrimination itself and violates Section 703(c)(1)[4] as well.[5]

In choosing to process some, but not all, of the grievances raised by union members, a union naturally treats some types of claims differently from others. Where this type of selective practice is adopted, this Court has set forth the test to determine whether the procedure constitutes a discriminatory and unlawful employment practice under Title VII. "The ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were 'racially premised'." *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 (1977) (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 805 n.18 (1973)).

Almost every Federal court that has addressed the issue has held that under Title VII it is a union's responsibility to take an active role in eliminating discrimination where it has the

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[4] From the commencement of this litigation, respondents herein asserted claims under both Sections 703(c)(1) and (3) in the District Court. That court found that the union had discriminated against the plaintiff class and that such practices cause perpetuation of employer discrimination. *See Goodman v. Lukens Steel Co.,* 580 F. Supp. 1114, 1160 (E.D. Pa. 1984) ("The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment."), *aff'd in part, rev'd in part, vacated in part,* 777 F.2d 113 (3d Cir. 1985), *cert. granted,* 107 S. Ct. 568 (1986).

[5] It is questionable whether any procedure that disfavors Federal rights is lawful. *Cf. Burnett v. Grattan,* 468 U.S. 42, 53 n.15 (1984).

power to do so.[6] The seminal case, upon which the courts below relied, is *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973). There the court held:

> "Where a union has not done so and where there is such solid evidence of employer discrimination as is alleged here, it would undermine Title VII's attempt to impose responsibility on both unions and employers to hold that union passivity at the negotiating table in such circumstances cannot constitute a violation of the Act."

Id. at 989.

The arguments put forth in both the petitioners' brief[7] and the Solicitor General's brief,[8] misstate the basic issue and ignore the findings of fact of the District Court:

> "[T]he evidence in this case proves far more than mere passivity on the part of the unions. The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution . . . and a union which, aware of racial discrimination against some of its members, fails to protect their interests."

Goodman, 580 F. Supp. at 1160; and the Court of Appeals affirmed echoing portions of the District Court opinion. *See* 777 F.2d at 126.

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[6] *See Howard v. International Molders and Allied Workers Union, AFL-CIO-CLC, Local # 100*, 779 F.2d 1546, 1553 (11th Cir.) (unions liable under Section 703(c)(3) for failing to make reasonable effort to end employer's use of racially discriminatory nonvalid tests for promotions), *cert. denied*, 106 S. Ct. 2092 (1986); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982) (Title VII and Section 1981 impose upon a union an affirmative obligation to oppose employment discrimination against its membership), *cert. denied*, 467 U.S. 1251 (1984); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252 (N.D. Ind. 1977).

[7] *See* Pet. Br. at 26 (describing the issue as the "question of union responsibility for employer discrimination").

[8] *See* U.S. Br. at 10 (describing respondents' theory as holding the unions liable for their "passive acquiescence in discrimination by the employer").

The unions argue that they were justified in refusing to process racial grievances because they could get effective relief if they categorized such grievances as "seniority" or other nondiscrimination claims. *See* Pet. Br. at 42-43. The District Court, the Court of Appeals and the *Macklin* line of cases do not agree with the unions. Disparate treatment by unions of all grievances that if processed could help eliminate discriminatory employment practices is discrimination in violation of Title VII.[9]

Moreover, a union's deliberate refusal to assist its members in eliminating discrimination encourages and allows an employer to continue discriminatory employment practices. *See Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 261 (N.D. Ind. 1977) (holding that Title VII places an affirmative duty on labor unions to eliminate discrimination).

Regardless of whether this case is scrutinized under Section 703(c)(1), prohibiting union discrimination, or Section 703(c)(3), prohibiting a union from causing an employer's discrimination, liability will lie under Title VII. Given the broad remedial intent of Title VII, it is in complete accord with the spirit of that legislation to hold the unions liable for discriminatory conduct that singles out for nonprocessing grievances based upon racial discrimination.

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[9] Moreover, the unions' argument fails completely with respect to probationary employees whose rights under the collective-bargaining agreement are virtually nonexistent. *See Goodman*, 580 F. Supp. at 1159. Since 1965, the collective-bargaining agreement at issue before this Court has included a provision prohibiting employers from discriminating against probationary employees. *See id.* Discrimination is virtually the only legitimate ground upon which a probationary employee may challenge employer conduct, and the probationary employee can only make such a challenge if the union files a grievance. Thus, the unions' policy of never filing a grievance on behalf of a probationary employee, *see id.*, is simply another way of avoiding their obligation to combat discrimination. Although respondents did not raise the issue below, the unions' treatment of probationary employees could be violative of Section 703(c)(2) prohibiting classification of members in a way that would deprive the individual of employment opportunities.

B. The Unions' Deliberate Refusal To Process Racial Grievances Violated Section 1981.

Both the unions and the Solicitor General argue that *General Bldg. Contractors Ass'n v. Pennsylvania,* 458 U.S. 375 (1982), is controlling and that the case proves that Section 1981 "provide[s] no basis for holding a union liable for discriminatory conduct of an employer". Pet. Br. at 45; *see* U.S. Br. at 25. In *General Bldg.*, this Court overturned a finding of an employer's liability under Section 1981 for a union's discrimination because the District Court had found a violation on proof of disparate impact alone and not upon proof of intentional discrimination. Additionally, the employer therein had no knowledge of the union's discriminatory practices. 458 U.S. at 383.

In sharp contrast to *General Bldg.*, the District Court herein found the unions guilty of deliberate and racially motivated conduct sufficient to give rise to liability under Section 1981. *See Goodman,* 580 F. Supp. at 1160 (holding the unions liable after noting that if racial animus is properly inferable there is liability under Section 1981). The District Court summed it up:

> "A union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title II [sic] and § 1981, regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities."

Id. The Court of Appeals affirmed; the necessary implication is that the findings of the District Court were not clearly erroneous. *See Anderson v. City of Bessemer City,* 470 U.S. 564, 566 (1985) ("a District Court's finding of discriminatory intent . . . is a factual finding that may be overturned on appeal only if it is clearly erroneous"); *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982) (Fed. R. Civ. P. 52(a) does not differentiate among categories of findings and, therefore, finding of discriminatory intent must be clearly erroneous to be overturned). *See generally* Fed. R. Civ. P. 52(a).

II. UNION LIABILITY UNDER SECTION 1981 AND TITLE VII FOR REFUSAL TO FIGHT EMPLOYER DISCRIMINATION IS CONSISTENT WITH NATIONAL LABOR RELATIONS POLICIES.

Petitioners and the Solicitor General argue that requiring a union to take a more active role in the fight against employment discrimination will somehow undermine the national labor policies embodied in the National Labor Relations Act ("NLRA"). To the contrary, the Title VII and Section 1981 obligations outlined in this case are wholly consistent with one of the basic principles of the NLRA—the union's duty of fair representation of all members.

A. Construing Title VII And Section 1981 To Prohibit A Union From Discrimination In The Processing Of Members' Grievances Is Consistent With The Duty Of Fair Representation.

This Court has held that a union, as the exclusive bargaining agent of the employees, has a duty fairly to represent all employees in both the negotiation and the enforcement of a collective-bargaining agreement. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). That duty is breached "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith". *Id.* at 190. Where the discrimination constituting a breach of the duty of fair representation is against one of the groups enumerated in Title VII, then Title VII is violated as well.

The pattern in the Federal courts has been that at least where the duty of fair representation is breached by a union's failure fairly to represent one of the classes enumerated in Section 703(c)(1) or (3), then Title VII is also violated. *See, e.g., Macklin*, 478 F.2d at 989.[10] The interpretation of Title VII and Section 1981 urged upon the Court would serve as an

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[10] *See generally* Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 719-24 (1980) (decisions holding unions liable under Title VII for inaction based on facts that would constitute breach of duty of fair representation).

added incentive for unions to adhere to their preexisting obligations.[11]

Contrary to contentions made by petitioners and the United States, respondents herein are not urging this Court to render a decision that requires a union to commence a Title VII action every time an employer discriminates against one of its members. The question here is actually much narrower than that: Whether a union, which is the sole certified collective-bargaining agent responsible for processing arbitrable grievances, may single out and refuse to process meritorious grievances when requested to do so by their aggrieved members simply because those grievances are based upon racial discrimination.

The unions' responsibilities to combat discrimination arise not only from Title VII but also from a collective-bargaining agreement that provides that Lukens must maintain a policy of nondiscrimination toward employees. The unions are obligated fairly to enforce that agreement, and the nondiscrimination provision therein. Under the national labor policy that principle is embodied in the duty of fair representation. Civil rights policy prohibits a union from discriminating,[12] or from causing an employer to discriminate.[13] That policy is embodied in Title VII and Section 1981.

The purposes of Title VII, Section 1981 and the duty of fair representation have always been focused on eliminating dis-

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[11] Although respondents did not assert a claim under the NLRA, the Court of Appeals held that:

> "The district court found that the unions intentionally avoided asserting claims of discrimination. In doing so, the unions violated the duty of fair representation owed to their members. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *see also*, Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980)."

Goodman, 777 F.2d at 127 (parallel citations omitted).

[12] *See* Section 703(c)(1); Section 1981.

[13] *See* Section 703(c)(3).

crimination. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), the Court held:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

And just as Title VII and Section 1981 arose out of a demonstrated need to wipe out the last vestiges of discrimination, so too:

> "The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act . . . ."

Vaca v. Sipes, 386 U.S. at 177 (citing *Steele*, 323 U.S. at 192 and *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213-14 (1944)). More recently this Court has held that "national labor policy embodies the principle of nondiscrimination as a matter of highest priority . . . ." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 66 (1975) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)). How could Title VII and Section 1981 be offensive to a doctrine that arose out of the same problems and maintains the same goal?

B. Requiring A Union To Meet Its Obligations Under Title VII And Section 1981 Imposes No Excessive Burdens Upon Unions.

The unions claim that they will face substantial hardships if forced to prosecute all racial grievances. *See* Pet. Br. at 44. This argument fails for three reasons.

First, a union is never required to process all grievances brought by its members. *Cf. Vaca v. Sipes*, 386 U.S. at 191 ("frivolous grievances are ended prior to the most costly and

time-consuming step in the grievance procedures"). Under Title VII, Section 1981 and the duty of fair representation, nonmeritorious claims should not be processed.

Second, as noted above, because the unions are already required by the duty of fair representation to pursue a course of conduct in compliance with Title VII and Section 1981, few additional burdens would be placed on the unions' resources.

Third, the argument is inapplicable to the facts herein. The District Court found that the unions refused to process racial grievances for reasons other than lack of their resources. The District Court held the unions liable because they intentionally singled out for nonprocessing discrimination claims "either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership". *Goodman,* 580 F. Supp. at 1160. Moreover, the unions recognized some of the claims as meritorious, and processed them; but they refused to identify the claims as racial grievances. Other claims they refused to process at all.[14] But for the unions' insistence on treating known acts of discrimination as isolated, nonracial events, the pattern of discrimination might have been ended long ago. As a result of their insistence, there have instead had to be fourteen years of litigation in the Federal courts.

III. A UNION MAY NOT COMPROMISE RIGHTS SECURED BY TITLE VII OR SECTION 1981.

Petitioners contend that their right to refuse to process meritorious racial grievances stems from the unions' right to "determine their own bargaining agendas and their own priorities and make their own compromises and agreements". Pet. Br. at 37.

In *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-18 (1975), this Court held that the elimination of discrimination

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[14] *See* discussion regarding probationary employees at footnote 7, *supra.*

had to be part of the union's agenda, whether the union wanted it to be or not. This Court stated:

> "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' "

Id. at 417-18 (quoting *United States v. N. L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), two white Teamsters were dismissed for misappropriating company property. A third and equally guilty accomplice, who was black, was not discharged. One of the discharged employees brought a Title VII action against the Teamsters Union. The union moved to dismiss on the ground that "in representing all the affected employees in their relations with the employer, the union may necessarily have to compromise by securing retention of only some". 427 U.S. at 284-85. This Court rejected that argument stating:

> "The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them."

Id. at 285.

In *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), this Court discussed the relationship between the union's duty to represent the majority and the

union's obligations to prevent discrimination against its membership:

> "In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests . . . Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit."

Id. at 64 (citing *Vaca v. Sipes*, 386 U.S. 171 and *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944)). This Court then acknowledged two cases wherein the National Labor Relations Board imposed upon a union the obligation to take action against discrimination. *See id.* (citing *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964) (failure to process racial grievances in violation of duty of fair representation is an unfair labor practice) and *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America v. NLRB*, 368 F.2d 12 (5th Cir. 1966) (Board ordered union to propose in collective-bargaining specific contractual provisions to prohibit racial discrimination), *cert. denied*, 389 U.S. 837 (1967)). It makes little sense that the union would not be liable under Title VII—legislation enacted to correct the injustice caused by decades of "majority rule"—for the same conduct that would violate the duty of fair representation under the NLRA.

The fundamental principle of *Emporium* is that the union and not the aggrieved member is the proper party to present racial discrimination grievances to the employer for arbitration. Aside from holding that the collective-bargaining agreement precluded minority factions from going straight to the employer, this Court highlighted why the union is the better candidate:

> "The collective-bargaining agreement involved here prohibited without qualification all manner of invidious discrimination and made any claimed violation a grievable issue. The grievance procedure is directed precisely at determining whether discrimination has occurred. . . . Nor

> is there any reason to believe that the processing of grievances is inherently limited to the correction of individual cases of discrimination."

Id. at 66 (footnotes omitted). This Court recognized not only that the union would be more effective than the individual at processing racial discrimination claims, but also that a united front is more capable of eliminating overall discrimination.

In *Emporium,* this Court described the national labor policy as "long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests". *Id.* at 65. The effect of Title VII and Section 1981 of deterring unions from deliberately refusing to challenge known patterns of discrimination—even though requested to do so by aggrieved members—is one of those safeguards.

IV. DISCRIMINATION CAN BE EFFECTIVELY ELIMINATED ONLY IF IT IS EXPOSED.

Petitioners cannot avoid Title VII liability by arguing that the unions brought claims for wrongs other than discrimination when presented by members with complaints of discrimination. Allowing a union repeatedly to classify racial discrimination claims as nonracial grievances would undermine Title VII's purpose of deterring discrimination.

A central purpose of Title VII is to deter discrimination. *See Bibbs v. Block,* 778 F.2d 1318, 1324 (8th Cir. 1985) (" 'by proving unlawful discrimination, appellant prevailed on a significant issue in the litigation' . . . and thereby vindicated a major purpose of Title VII, the rooting out and deterrence of job discrimination") (citation omitted); *Diaz v. American Tel. & Tel.,* 752 F.2d 1356, 1360 (9th Cir. 1985) ("[i]t is, of course, true that Title VII was designed to deter and remedy discrimination on the basis of group characteristics and to remove barriers that favor certain groups over others"); *Stamford Bd.*

of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70, 73 (2d Cir. 1982) ("public policy goals of Title VII, for example, are to deter discrimination by reason of sex and to compensate aggrieved persons for the injuries caused to them by reason of the discrimination") (footnote omitted); *Thompson v. Sawyer,* 678 F.2d 257, 291 (D.C. Cir. 1982) ("Title VII relief is to be targeted to deter illegal discrimination and to compensate its victims"); *Rich v. Martin Marietta Corp.,* 522 F.2d 333, 342 (10th Cir. 1975) ("objects and purposes of Title VII . . . are to achieve equality of employment opportunity and to deter discriminatory practices").

Courts have explicitly discussed and fashioned Title VII doctrine in terms of deterrence of future discrimination. *See Albemarle Paper Co. v. Moody,* 422 U.S. at 417-18; *Toney v. Block,* 705 F.2d 1364, 1373 (D.C. Cir. 1983) (employer required to prove by clear and convincing evidence that there is no basis for backpay, and employee can get ruling on liability even where there are no damages) (Tamm, J., concurring in result); *EEOC v. Local 638 . . . Local 28, Sheet Metal Workers' Int'l Ass'n,* 532 F.2d 821, 832 (2d Cir. 1976) (back pay); *Reeder-Baker v. Lincoln Nat'l Corp.,* 649 F. Supp. 647, 663 (N.D. Ind. 1986) (punitive damages); *Stephenson v. Simon,* 448 F. Supp. 708, 709 (D.D.C. 1978) (attorneys' fees); *Altman v. Stevens Fashion Fabrics,* 441 F. Supp. 1318, 1321 (N.D. Cal. 1977) (individual liability of officers).

Title VII's utility as a deterrent to discrimination will be undercut if Title VII claims are regularly characterized merely as claims for wrongs other than discrimination. Obviously, a deterrent scheme only works if people know it exists and is being enforced. Thus, in the context of a Fourth Amendment exclusionary rule case, this Court has noted that the "concept of effective deterrence assumes that the police officer knows the probable consequences of a presumably impermissible course of conduct". *Nix v. Williams,* 467 U.S. 431, 445 (1984) (quoting *United States v. Ceccolini,* 435 U.S. 268, 283 (1978) (Burger, C.J., concurring in judgment)).

The foregoing is consistent with the District Court's statements that:

> "[I]t seems obvious that vigorous pursuit of claims of racial discrimination would have focused attention upon racial issues and compelled some change in racial attitudes. The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment. In short, the unions' unwillingness to assert racial discrimination claims as such rendered the non-discrimination clause in the collective bargaining agreement a dead letter."

Goodman, 580 F. Supp. at 1160. The unions' failure to focus that attention resulted not only in the perpetuation of Lukens' discriminatory employment practices, but also in demonstrated ambivalence and prejudice from class plaintiffs' white co-workers.[15]

Upon submission of the bill that became Title VII to the Judiciary Committee of the House of Representatives, Rep. Dawson explained the need for deterrent legislation:

> "Racial discrimination harms not only the person against whom it is directed, but also scars the mind and morals of those who indulge or acquiesce in it. In addition, the country as a whole is weakened because substantial numbers of its people are thus deprived of adequate education, employment, recreation, voting participation, and other essentials of our national life to which all citizens ought to contribute to the maximum of their abilities."

110 Cong. Rec. 2732 (1964).

The facts of this case amply demonstrate the continuing harm caused by discrimination and the sensitivity of the lower courts to redress that condition. Before the commencement of

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[15] "Plaintiffs presented a mass of evidence of individual instances of racial harassment and/or discriminatory treatment." *Goodman,* 580 F. Supp. at 1147. The incidents ranged from obscene statements to derogatory graffiti to demonstrated Ku Klux Klan activities. *See generally id.* at 1147-51.

this lawsuit, minority employees were discriminated against by Lukens, harassed by co-workers and denied assistance from their union in processing their grievances. Despite the unions' attempts to secure relief by processing nonracial grievances on behalf of victims of discrimination, the discrimination and the harassment continued. Since this lawsuit, Lukens has agreed to a settlement and the unions have processed significantly more racial grievances; one must assume that, because of the pendency of this action and the relief awarded by the lower courts, racial harassment at Lukens has subsided.

If the unions had taken earlier action and assisted their members in fighting discrimination, far less harm would have visited the class plaintiffs herein. Had the unions acted as Congress intended they act, discrimination at Lukens could have been eliminated long ago without the need for fourteen years of litigation or the involvement of this Court.

CONCLUSION

The judgment for the Court of Appeals for the Third Circuit should be affirmed.

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